No. 73-1742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. SAVE AMERICA'S VITAL ENVIRONMENT, JANEY WEBER, AND SUSANNE ALLSTROM,

Respondents.

MEMORANDUM IN REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents Natural Resources Defense Counsel, et al. (for convenience, "NRDC"), support the granting of a writ of certiorari, for the purpose of resolving a conflict among the circuits. In all other respects, the petition is without merit.

BACKGROUND

In enacting the Clean Air Amendments of 1970, Congress expressed its strong commitment to the goal of rapidly restoring the nation's air to healthful and en-

vironmentally beneficial quality. The new statute substantially altered the previously-prevailing distribution of responsibility for attacking this major health problem, markedly enlarging the supervisory role of the federal government over State and local efforts to abate pollution. This decision was not lightly taken. Through the 15 previous years, four separate federal statutes [1] had entrusted this task to the lower jurisdictions, without success. In 1970, the Congress found that, far from improving, "the air pollution problem is more severe, more pervasive, and growing at a more rapid rate" than before.[2]

It was thus obvious to the drafters of the 1970 legislation that a far stronger federal role was needed if the air was to become clean again. Hence large areas of regulation were exclusively entrusted to the federal EPA: for example, establishing emission standards for "new sources" of pollution, based upon the application of the best available technology (§ 111);[3] setting standards for sources of "hazardous pollutants" (§ 112); controlling automotive fuel additives (§ 211); and regulating emissions from new automobiles and other "mobile sources" (§ 202).

With respect to existing stationary sources of pollution, however, Congress chose not to discard totally the State and local programs that had developed under the previous legislation. Instead, the legislature undertook a creative exercise in federalism, building upon the existing organizational structure and expertise of the State

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[1] Act of 1955, 69 Stat. 372 (1955); Clean Air Act of 1963, 77 Stat. 392 (1963); Amendments to the Clean Air Act, 79 Stat. 996 (1965); Clean Air Act of 1967, 81 Stat. 485 (1967).

[2] S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970) at 1.

[3] 42 U.S.C. § 1857c-6. Because the United States Code notation for the statute is quite clumsy, we hereafter adopt the original notation of the Act.

and local agencies, but allocating to EPA certain major functions to prevent inaction. The State and local agencies were to prepare and submit "Implementation Plans," binding themselves to a specific program of action designed to meet federally established standards for healthful air quality as expeditiously as practible, but (subject to the two exceptions discussed below) not later than mid-1975.[1] The object was, as the court below correctly noted, to ensure that ambitious commitments were undertaken by the States, in order to force the development of technology and the pace of administrative action. *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, (decision below) *Pet. App.* at 22a.

In view of the States' previous failure to commit themselves energetically to the needed measures, however, the legislation sharply curtailed State and local autonomy even with respect to Implementation Plans. For example, though the States were to formulate Implementation Plans, EPA was instructed to exercise a powerful supervisory role. If a State Plan failed in any respect to meet the detailed statutory blueprint of § 110(a), EPA was to disapprove it and promulgate binding federal regulations to replace the offending portion. Consistent with the new scheme, the statute also sharply curtailed the States' power to defer the implementation of their Plans. Where the States had previously exercised the power to grant a variance (or its equivalent) from their control regulations whenever a polluter could meet vaguely specified and highly discretionary standards such as "hardship," the new law substituted two carefully drawn federal procedures—"extensions" (§ 110(e)) and "postponements" (§ 110(f)). Consistent with the Congress' determination that the restoration of healthful air quality

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[1] § 110, 42 U.S.C. § 1857c-5. This section is reprinted, with the original notation, in Appendix C of Petitioner's Appendix at page 56a, *et seq.*

was so urgent it must take precedence over narrow economic interests, *NRDC, et al.*, v. *EPA*, (decision below) Point V (unchallenged in the instant petition for certiorari), *Pet. App.* at 48a *et seq.*; *NRDC, et al.*, v. *EPA*, 478 F.2d 875, at 888-9 (1st Cir., 1973), these two provisions limited the degree of flexibility and administrative discretion, while providing relief for genuine cases of inability to comply. Federal "extensions," of as much as two years, could be granted to a State or Air Quality Control Region in those few instances where, even with the application of all the available means to control pollution, an area was so polluted that healthful air quality could not be attained even by 1975. Likewise, in the unusual situation where a specific polluter could not meet the requirements of his State's Plan, the federal EPA could grant him immunity from the statute's penalties for up to one year at a time through a federal "postponement." In order to avoid the abuses associated with the State variance procedures, however, this federal variance provision was designed to force a formal demonstration, in a judicialized federal administrative hearing, that continued jeopardy of the public health was truly unavoidable, and that the continued operation of the offending source without penalty served an important public interest. Since the standard for obtaining a postponement was purposely stricter than that for obtaining State variances, the federal law pre-empted the existing State laws.

In August, 1971, the EPA Administrator promulgated regulations which were inconsistent with this provision, in that they purported to make the application of the federal postponement procedure discretionary with federal and State administrators, rather than mandatory as Congress had intended. 40 C.F.R. § 51.32(f) (formerly 42 C.F.R. § 420.32(f)). Under these regulations, a polluter would be required to seek a postponement rather

than a State or local variance only upon a finding by the State that the requested variance would prevent the attainment or maintenance of a National Air Quality Standard. When, in May of 1972, acting under this regulation, the Agency approved State Implementation Plans that would continue to authorize State variances in violation of § 110(f), NRDC, in conjunction with numerous local citizens and clean air organizations, petitioned for review of the approvals of a number of State Plans.*

Beginning with the First Circuit, four federal Courts of Appeals subsequently upheld these petitioners' contention that EPA had illegally attempted to impute discretion where none had been intended. All four agreed wholeheartedly that Congress had intended to pre-empt State variance procedures. They differed on only one point: the date on which pre-emption was to occur. The Fifth Circuit, agreeing with petitioners, held that the postponement procedure was intended to pre-empt State variance procedures immediately: that is, once EPA had approved a State Plan, a polluter could be insulated from attack for violating a part of it only if he obtained a federal postponement. The First Circuit, later followed by the Eighth and Second Circuits, held that pre-emption occurred as of the date set for attainment of the National Primary Standards (mid-1975 or earlier, except in those few cases where a State had sought and obtained an extension for attainment pursuant to § 110(e)).

EPA has since stated its agreement with the First Circuit position, though it has not, more than a year after the court's decision, rescinded its illegal regulation. Thus in petitioning this Court for a writ of certiorari, the

* Because the statute's review provision, § 307 of the Clean Air Amendments, required a petition for review of a Plan approval to be brought in the "appropriate circuit," it appeared impossible to challenge the approvals of all deficient State variance statutes in one piece of litigation. Hence the same legal issue was brought before several federal Courts of Appeal.

Agency has presented the Court with the narrow issue of whether pre-emption has already occurred, or whether it will occur only at the attainment date.

THE WRIT SHOULD BE GRANTED

Respondents believe the Court should grant the writ, because it presents a conflict in the circuits that should be resolved. As noted previously, the Clean Air Amendments represent a major change in governmental policy towards pollution control, intended to place public health properly in the fore. The decision to pre-empt State variance laws, substituting a federal procedure designed to be more protective of public health, is one of the lynchpins of this effort to increase the pressure to restore healthful air quality as rapidly as possible. On such an important matter of public policy, this Court should take the opportunity to resolve the conflict over precisely when the more protective federal procedure becomes effective. Furthermore, the conflicting holdings reached by the different circuits, could, in a few instances, result in uneven treatment of the affected industries.

On the merits, the Fifth Circuit's decision is incontestably the more carefully reasoned and correct. It is grounded securely in the clear language of the statute, and in extensive legislative history that plainly establishes the Congressional intent to pre-empt entirely the State law variances. By contrast, the First Circuit's decision, which the petitioners charitably characterize as "solomonesque," *Pet. for Cert.* at 7, represents a compromise between the positions of NRDC and EPA that is not supported by either the statute or its legislative history. Obviously, this summary memorandum is not appropriate for a full explication of this point, but it suffices to say that the lower court was fully aware of the ambiguous snippet of floor debate claimed by the government to support its position, *Pet. for Cert.* at 14, cor-

rectly concluding that it was neither powerful nor persuasive when ranged against the plain language of the statute and overwhelming legislative history on the other side.[*] Likewise, the Fifth Circuit carefully considered, and repeatedly rejected, the claim that a decision in NRDC's favor would disrupt the administration of the federal program. This same claim was made before the First Circuit in opposition to the rule the Agency now says it is willing to embrace. The claim must be seen for what it is—an appeal to the lawless notion that the courts and the Congress have no power to redress illegal conduct undertaken by the executive branch.

CONCLUSION

On the basis of the foregoing, respondents urge that the Court grant the petition for certiorari, in order to resolve the conflict among the circuits.

Respectfully submitted.

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RICHARD E. AYRES

/s/ Ogden Doremus
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July 8, 1974

[*] The petitioner's suggestion that the quoted statement by Senator Muskie is the "only relevant legislative history" is simply and woefully in error.